

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW AVINASH ARORA,

Defendant-Appellant.

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UNPUBLISHED

February 25, 2000

No. 213460

Kent Circuit Court

LC No. 97-008530-FC

Before: Markey, P.J., and Murphy and R. B. Burns\*, JJ.

PER CURIAM.

Defendant Andrew Avinash Arora was convicted by a jury of unarmed robbery, MCL 750.530; MSA 28.798. He was sentenced, as an habitual felony offender subject to MCL 769.11; MSA 28.1083, to a prison term of five to thirty years. Defendant appeals as of right, claiming that the actions of the prosecutor and his attorney at trial denied him a fair trial and warrant reversal of his conviction. We affirm.

This case arises from the events of May 17, 1997. On that date, defendant and Raymond Jordon went to a house where three brothers, Joshua Zeits (Josh), Aaron Leahy, and James Zeits (James), were home watching television. Defendant and Ray knocked on the door and were let into the house. The two inquired into trading an amplifier for a car stereo they understood that James had for sale. James produced the car stereo for the two and allowed defendant and Ray to look at and hold it. Defendant and Ray then walked out the door with the car stereo, without permission. James followed them out, whereupon a fight broke out between James and defendant. They were soon joined by Ray and three other young men who were waiting outside for defendant and Ray. One of the five young men who went to the Zeits' residence threw a brick into the house, striking Josh on the ankle. The young men outside then ran down the street. The police eventually arrested all five of the young men, including defendant, who came to the Zeits' house that evening.

Defendant first argues that the prosecutor acted improperly by arguing to the jurors that it was their duty to convict defendant and by eliciting from a police detective his opinion as to defendant's guilt.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

We disagree. At trial defendant failed to object to these alleged instances of misconduct. Appellate review of allegedly improper prosecutorial conduct is precluded if the defendant fails to timely and specifically object unless a curative instruction could not have eliminated the prejudicial effect or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant contends that the prosecutor's following statement, made during her closing argument, denied him a fair trial:

You need to find him responsible for what he did because not only did he do it, but when you send that message you're telling kids like Joshua, . . . [and] Aaron Zeits . . . and kids maybe like these other two who supposedly didn't, you know, actually do anything really except be with the defendants like this Geraldo who's like 13 or so and this Carl, this other kid, is to tell those people too that, you know, that's not the way you resolve things in this world. . . . The way you do it is to do what James Zeits and his family did. . . . they want to do it the right way or their mother wants them to do it the right way. **And you need to find him [the defendant] responsible for what he did to tell these people, yeah, the system works.** This is the way it works. You don't get away with stuff like this and **maybe these 13 year olds and these 15 year olds are salvageable, you know, if they see that you can't get away with this stuff. But if you don't hold him responsible for what he did because you don't think it's all the [sic] important of a case or these people aren't really worthy of your time or belief, then you're sending him a message that - - and these other kids, because they know what happens, they see him, if he gets off they'd see him, hey, this is the way to do it.** You can beat it. . . . and all that tells people like him and like these other kids is to keep doing it. [Emphasis added by defendant.]

Following that last sentence above, the prosecutor concluded her closing argument by stating: "Find him responsible for unarmed robbery because that's what he did."

"Civic duty" arguments to the jury are improper as they divert jurors from the real issues of guilt and innocence. *People v Biondo*, 76 Mich App 155, 158-159; 256 NW2d 60 (1977); *People v Meir*, 67 Mich App 534, 537-538; 241 NW2d 280 (1976). While the prosecutor's remarks arguably violate the prohibition against making such civic duty comments, their prejudicial effect could have been cured by objection and instruction. *Stanaway, supra*. Further, defendant has not shown, and the evidence does not indicate, that substantial injustice would result if his conviction were not overturned because of the prosecutor's closing remarks. *Id.* We find no error mandating reversal.

Defendant's second disagreement with the prosecutor's conduct at trial revolves around the following testimony of a police detective, elicited on redirect:

Q. Detective, you were just asked whether or not you supply the warrant because you just have the evidence. Based on your investigation, did your investigation reveal to you that there had been a crime committed?

A. Yes.

Q. And at that time involved a robbery?

A. An armed robbery.

Q. Because in your mind the bricks were a weapon?

A. It's a dangerous weapon.

Q. Okay. And based on your investigation you came to the Prosecutor's Office to ask for a warrant on [defendant]?

A. Yes.

Q. Based on your investigation?

A. Yes.

Q. Are you required to come to us and ask for a warrant on every crime that you investigate?

A. Yes.

Q. And would you come to us and ask for a warrant on him if you didn't have the evidence to support it?

A. No.

Defendant characterizes the detective's testimony as rendering an opinion as to the guilt of defendant. Whether a defendant is guilty is for the jury to decide and not a valid question for a witness. *People v Suchy*, 143 Mich App 136, 148-149; 371 NW2d 502 (1985). Although in the above exchange the prosecutor did not elicit and the detective did not volunteer a bald opinion as to defendant's guilt, the detective's belief that defendant committed a crime can be easily deduced.

The prosecutor elicited the above redirect testimony in response to the following exchange on cross-examination:

Q. Okay. Office [sic] Doyle, basically you as a detective have a duty to take reports from people and investigate, find out if there's something to support their story and if you believe that there's something to support the story then you take the case to the prosecutor for review, is that correct?

A. Correct.

Q. Okay. You in fact don't make determinations whether or not a crime took place. It's your duty [to] investigate evidence and bring forth pieces of information that you find?

A. Right.

Q. Okay. And that's basically what you did in this case?

A. Right. Well, I believed a crime took place that's why I took it to the Prosecutor's Office.

Q. That's why you - - okay. You believed that you had enough evidence to support your belief that a crime took place.

A. Yes.

Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). As evidenced by the testimony above, the questions asked by the prosecutor and objected to by defendant on appeal were first asked by defense counsel. The testimony of the detective on redirect in this case, occurring after defense counsel's cross-examination covering the same territory, did not deny defendant a fair trial.

Defendant next argues that his counsel was ineffective at trial by presenting inconsistent theories and failing to object to prejudicial inadmissible opinion testimony given by the police detective on cross-examination. We again disagree. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway*, *supra* at 687.

Defendant notes that in his opening statement defense counsel told the jury that a witness would testify that defendant was not present at the Zeits' house the evening in question. As further noted by defendant, defense counsel proceeded to question Josh and James about whether they clearly remembered defendant and about why they did not mention his presence to the police on the evening of the incident. Defendant contends that from defense counsel's opening statement, and from his cross-examination attempts to impeach the testimony of prosecution witnesses, it appeared that the defense theory was that defendant was not present when the crime was committed. Defense counsel, however,

both during direct examination of a defense witness and in his closing argument, either stated or implied that defendant was at the victims' house that evening. Defendant argues that in failing to consistently focus on the theory that defendant was not present at the time of the crime, defense counsel rendered ineffective assistance.

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). If, as he noted in his opening statement, defense counsel at the very start of the trial hoped to show that defendant was not present that evening, testimony from the prosecution witnesses soon made clear how difficult that theory would be to prove. Defense counsel's decision to discontinue pursuit of the theory that defendant was not present that night was accordingly a strategic decision. We find no error.

Defendant's final argument claims error in defense counsel's failure to object at the conclusion of the above referenced cross-examination exchange between defense counsel and the detective. In that exchange defense counsel asked the detective whether, during the course of an investigation, he forms a belief as to whether a crime took place. Contrary to defendant's appellate argument, the detective did not specifically offer an opinion as to the guilt of defendant. To the extent the detective's remarks may have implied a belief in defendant's guilt, defense counsel may have chosen not to object for strategic reasons. Without a *Ginther* hearing, however, this Court cannot know what defense counsel was thinking. Because we find no mistake apparent on the record, *Price, supra* at 547, defendant's final claim of error also fails.

Affirmed.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Robert B. Burns